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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FREDERICO CASTILLO LOZOYA, Defendant and Appellant.	H039145 (Santa Cruz County Super. Ct. No. F19572)

Frederico Castillo Lozoya was convicted after a jury trial of second-degree murder. The evidence to support the conviction was robust, including his own testimony, statements to his neighbors, and their observations of defendant dragging the dead body and putting it into the trunk of the victim's car.

On appeal, defendant asserts that the trial court erred in: (1) denying his motion for disclosure of contact information for the two main prosecution witnesses; (2) admitting evidence at trial that defendant had been tried and acquitted of murder in a previous case; (3) denying his request for a jury instruction on involuntary manslaughter; and (4) giving two "pro-prosecution" jury instructions. Defendant also argues that his conviction should be reversed because of the prosecutor's misconduct which deprived him of his right to a fair trial.

STATEMENT OF THE FACTS AND CASE

In July 2010, defendant lived in Capitola next door to a house in which Joseph Bertoni and Joseph Perna were roommates. On July 29, 2010, when Bertoni came home from work, he saw defendant standing outside in front of defendant's house. Defendant offered Bertoni a beer. Bertoni went inside defendant's house. While inside defendant's house, defendant told Bertoni that a heroin dealer had drugged and raped the daughter of a friend of his. Defendant said he called the dealer and told him he wanted to buy heroin as a ruse to get the dealer to come to his house. Defendant said the dealer was on his way. Defendant told Bertoni he was going "to take care of it." Defendant lifted up his shirt and showed Bertoni a gun. Bertoni was scared and then left defendant's house by the back door.

As Bertoni was leaving, he saw a small four-door car pull up. Juan Garcia was driving the car. Bertoni went into his house and told Perna that defendant was "acting weird," and that he had showed Bertoni a gun. Bertoni drank a shot of vodka and then went into the backyard to smoke a cigarette. Bertoni heard two guys speaking Spanish next door. Bertoni went back into his house and drank more alcohol. He returned to the backyard for another cigarette at about 6:00 p.m. He could not hear any voices coming from next door. Bertoni heard a pop and a thud, like something heavy hitting the floor. Appellant then came through Bertoni's back gate. Defendant asked Bertoni for a cigarette and a shot of alcohol. Defendant and Betoni went into Bertoni's house, and while they were in the kitchen, defendant said, "[H]e had gotten away with this before and he had been put up for murder one and he got off." Defendant talked about the rape of the young girl, and told Bertoni: "[D]on't worry, I took care of it." Defendant asked Bertoni to help him move something and Bertoni said "no." Bertoni said, "I just got a little bit of a mess to clean up." Defendant went back to his house through the side gate.

Bertoni went into his bathroom and heard a car pull up near the window. The car was pointed toward the street. Bertoni saw feet being dragged down defendant's stairs that had on white tennis shoes. Bertoni was afraid to call the police. Bertoni heard a garden hose being used on the back steps of defendant's house. Bertoni saw the car leave defendant's driveway. The next day, Bertoni saw defendant scrubbing the patio at his house. Neither Bertoni nor Perna called the police to report what they saw because they were afraid.

On July 30, 2010, a Ford Taurus with Garcia's body in the back seat was found in the parking lot of Soquel High School. The back seat of the car was covered in blood. Garcia had a gunshot wound in the back of the head. His shirt was soaked with blood, and he was wearing white tennis shoes.

When the car was searched, officers found a plastic baggie with seven bindles of cocaine, and 10 bindles of methamphetamine inside the trunk. Inside Garcia's pants' pocket was a small bindle of methamphetamine.

The results of the autopsy of Juan Garcia showed that the cause of death was a single gunshot wound to the head. This wound would cause the victim to immediately drop to the ground.

Following the discovery of Garcia's body, Sheriff's Deputies informed his girlfriend, Julie Carillo, of Garcia's death. Carillo told them that Garcia had been dealing cocaine and methamphetamine for about three years. Garcia kept the drugs in his car under the spare tire. On July 29, 2010, Garcia dropped Carillo off at her house, and told her he needed to deliver drugs. Carillo said that Garcia did not carry a gun or a knife. Carillo also said that Garcia delivered drugs to defendant weekly, and that she had been to defendant's house with Garcia about 10 times. Garcia made the drug deals with defendant at defendant's house.

On July 31, 2010, defendant was arrested for the killing of Garcia. On November 5, 2010, defendant was charged with murder. (Pen. Code, § 187.)[1] The information alleged that defendant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally used a firearm (§ 12022.53, subd. (b)).

Defendant testified at trial. He said that in July 2010, he was using methamphetamine regularly, and bought his drugs from Garcia. Defendant would call Garcia when he wanted drugs, and Garcia would bring them to his house.

In May or June 2010, defendant overheard two young girls ask a neighbor for "Temo['s]" (A.K.A. Garcia) location. The neighbor told defendant that Garcia gives the girls drugs, and that Garcia bragged that he was "hittin' that" too. Defendant was upset that Garcia was having sex with young girls.

On July 29, 2010, defendant called Garcia and asked him to bring methamphetamine to defendant's house. Later in the afternoon, Bertoni walked over to his house and asked defendant for marijuana. Defendant went into his house with Bertoni, and gave him beer, some marijuana and a shot of liquor. Defendant did not tell Bertoni that a drug dealer was coming to his house or that the dealer had raped a girl. Defendant did not own a handgun, and did not show any gun to Bertoni.

After Bertoni left, Garcia pulled his car into defendant's driveway. Garcia got out of his car and talked with defendant. Defendant was drinking a beer on his porch and asked if Garcia wanted one. Garcia followed defendant into his kitchen so defendant could get the beer. Defendant asked Garcia about "kickin' it" with young girls. Garcia said, "yeah, we've been talkin'" and admitted giving them methamphetamine. Garcia told defendant to "mind [his] own fuckin' business." Defendant asked what Garcia's wife would think; Garcia then took a swing at defendant but missed. In response,

[1] All statutory references are to the Penal Code.

defendant shoved Garcia, and Garcia tripped and fell. Defendant saw a gun on the floor right next to Garcia. Garcia got up and threw his body toward the gun. Defendant grabbed Garcia, held his head, and told him to stop. Garcia said he would stop, and defendant let him go. Garcia grabbed the gun. Defendant grabbed the butt of the gun and shoved Garcia.

Defendant shot Garcia, and Garcia landed face down on the kitchen floor. Defendant walked out of his house with the gun in his hand. Bertoni was in his backyard, looking at defendant. Defendant asked Bertoni if he could come over. Defendant put the gun into his waistband. Defendant went into Bertoni's yard through the back gate, and said, "I just shot this guy." Defendant told Bertoni that he and Garcia got into a fight and defendant took Garcia's gun and shot him.

Defendant showed Bertoni the gun. Defendant told Bertoni that a long time ago, he had been arrested for murder. Defendant said that because of his prior record, the police would "be all over my shit." Defendant did not call the police or an ambulance because he was afraid. Bertoni asked defendant if he wanted some alcohol and defendant said yes. Perna was in the kitchen and he gave Bertoni two glasses of alcohol.

Defendant went back to his house, and panicked when he saw Garcia's body on the kitchen floor. Defendant buried the gun in the dirt. Defendant moved Garcia's body and used towels to mop up the blood. Garcia's keys were still in the car ignition, so defendant backed the car to the kitchen door. Defendant went into the bathroom and took rubber gloves from a hair coloring kit and put the gloves on. Defendant moved Garcia's body from his kitchen into the backseat of Garcia's car. Defendant then moved the car back to where Garcia had originally parked it. Defendant hosed off the blood on the back steps of the house. He went into the kitchen and cleaned up the floor.

After he cleaned up the blood in the kitchen and on the back steps, defendant went to Garcia's car and drove it away from his house. Defendant took the rubber gloves off

and put them on the passenger seat along with Garcia's cell phone. Defendant drove the car to the lower parking lot of Soquel High School, parked, and left it there. There were no other cars in the parking lot.

After walking home, defendant removed his bloody clothing and showered. He dug up the buried gun, took the bullets out of the gun, and put the gun and his clothes into a garbage bag. Defendant took the bag to a commercial dumpster where he threw the bag out.

On July 31, 2010, defendant noticed that the police were watching his house. He left his house and drove his car toward the mall, and noticed that a police undercover car was following him. Defendant went back home briefly, but then left and drove around the city. As defendant was pulling into the driveway of his house, the police followed him and arrested him for being under the influence.

During a police interview following his arrest, defendant said that he called Garcia on July 30, 2010, to arrange to get drugs. Garcia came to defendant's house at 5:00 p.m. Defendant shot Garcia at 5:15 p.m. After the gun went off, Bertoni was in the backyard. Bertoni looked surprised. Appellant showed Bertoni the gun but did not mean to threaten him. Bertoni told defendant, "sounds like the guy deserved it." Defendant said that he did not intend to shoot or kill Garcia.

In defendant's statement to police, he said that he had been using methamphetamine regularly for the about two months. Defendant said that he called his regular drug source the previous day to get more methamphetamine. Defendant identified his drug dealer as "Temo." He stated that he last saw Temo two weeks earlier. Temo brought his wife and child with him in the car. Defendant denied that Garcia came to his house on July 29, 2010. Defendant told the police that nothing happened at his home. Defendant said that he had no problem with his neighbors Joe (Perna) and Vito (Bertoni). Defendant had no idea why they made up stories about him.

On September 26, 2012, the jury found appellant guilty of second-degree murder and found true the allegation that he personally and intentionally discharged a firearm causing death. On December 21, 2012, the court imposed judgment of imprisonment for a total term of 40 years to life. Notice of appeal was filed on December 24, 2012.

DISCUSSION

Defendant asserts that his conviction should be reversed, because the trial court erred by denying his motion for disclosure of contact information of Bertoni and Perna, admitting evidence of his previous murder acquittal, and in instructing the jury. In addition, defendant argues he was denied his right to a fair trial because of the prosecutor's misconduct.

Motion for Disclosure of Contact Information of Witnesses

Defendant argues that the trial court erred in denying his motion to compel discovery of Bertoni and Perna's contact information.

Pursuant to section 1054.7, the trial court found good cause to deny defendant's request to disclose contact information based on the fact that Bertoni and Perna were in fear for their safety. We review the denial of discovery of a witness's contact information for good cause under section 1054.7 for abuse of discretion. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1134.)

Section 1054.7 provides, in relevant part: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. [¶] Upon the request of

any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ."

In *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326 (*Reid*), this court stated: "[a] criminal defendant does not have a fundamental due process right to pretrial interviews or depositions. [Citation.] However, a defendant does have a right to the names and addresses of prosecution witnesses and a right to have an opportunity to interview those witnesses if they are willing to be interviewed. [Citations.]" (*Id.* at p. 1332.) Thus, a prosecutor must disclose the names and addresses of potential trial witnesses, upon request, "unless good cause is shown why a disclosure should be denied, restricted, or deferred. 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (§§ 1054.7, 1054.1.)

In order for this court to determine whether the trial court has abused its discretion, we must independently review the records in question. (See *People v. Avila* (2006) 38 Cal.4th 491, 606-607.) Based on our review of the in camera proceedings, we find the trial court correctly found good cause to refuse to disclose the contact information for Bertoni and Perna.

The record shows that an event happened on January 8, 2011 that caused Bertoni and Perna to fear for their safety. Their fear was so great, that Bertoni and Perna requested that they be placed in a witness protection program. The trial court conducted an in camera hearing to determine if Bertoni and Perna's fear supported a finding of good cause to refuse to disclose their contact information to the defense. After conducting the

hearing, the court determined that there were "legitimate concerns by those witnesses concerning potential threat to their safety," such that disclosure of information should be denied.

This case is similar to *Montez v. Superior* Court (1992) 5 Cal.App.4th 763, in which defense counsel sought disclosure of the addresses and telephone numbers of the prosecution witnesses. (*Id.* at p. 765.) The four witnesses were present when the victim was murdered at the witnesses' place of employment, and they objected to the disclosure of their telephone numbers and addresses. (*Id.* at pp. 767, 771.) Based on the defendants' gang affiliation, the witnesses described their fears. (*Id.* at p. 768.) One witness stated that the defendants' associates had previously attempted to harass him and his family, and another stated that his parents " 'fear that these people might come back and avenge their conviction toward [them]. Also these people are capable of doing the same crime again without thinking twice about it.' " (*Id.* at p. 771.) The third witness " 'noticed persons who appeared to [him] to be either relatives & or friends of the defendants checking [him] out as to intimidate [him]' " while the other witness stated that he would not feel safe if " 'these guys found out or their fr[ie]nds they could do bad thing[s] to [him] or [his] family.' " (*Ibid.*) The prosecution offered to make the witnesses available to petitioner's counsel. (*Id.* at p. 767.) *Montez* upheld the trial court's order to withhold the witnesses' contact information, noting that no showing had been made that the witnesses had a bad reputation for veracity. (*Id.* at pp. 765, 768.)

Contrary to defendant's argument, the failure to disclose Bertoni and Perna's contact information did not limit his constitutional right to confrontation. Defendant cites *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684, for the proposition that the court's refusal to provide the witnesses' contact information foreclosed his right to cross-examination. However, there is nothing here to support this assertion. While defense counsel wanted to secure a statement from the witnesses that could possibility be used to

impeach the witnesses at trial, defendant did not have a constitutional right to such a statement. Moreover, the lack of contact information for the witnesses did not preclude defendant from cross-examining Bertoni and Perna about their unwillingness to speak to defense investigators. The trial court's finding of good cause to withhold disclosure of Bertoni and Perna's contact information did not violate defendant's constitutional right to confrontation.

It should be noted that the record shows that Bertoni and Perna did not wish to be contacted by defense investigators, nor were they willing to submit to any type of defense interview. Not only does a defendant not have a right to pretrial interviews of witnesses, a defendant may only interview "those witnesses if they are willing to be interviewed." (*Reid, supra*, 55 Cal.App.4th at p. 1332.) Bertoni and Perna made it clear that they did not wish to be contacted by defense investigators.

The trial court did not err in denying defendant's request for contact information for Bertoni and Perna. There was evidence in the record that Beroni and Perna reasonably feared for their safety such that there was good cause to withhold their contact information from the defense.

Admission of Evidence of Prior Murder Acquittal

Defendant argues that the trial court erred in admitting evidence of his 1986 murder acquittal.

At trial, the court granted the prosecution's motion in limine to admit defendant's statement to Perna and Bertoni that he had been charged with murder in the past, and that he "got off." The court also admitted evidence of defendant's prior 1986 prosecution and acquittal of murder. The court admitted the extrinsic evidence under Evidence Code section 352, finding that the evidence provided "meaning and context," to defendant's statements to Perna and Bertoni about his prior murder charge. The court specifically

excluded the prior conviction for any other purpose, including common scheme or plan under Evidence Code section 1101, subdivision (b).

Before Perna testified about defendant's statement to him, the trial court instructed the jury as follows: "You've received evidence or are about to receive evidence that Mr. Lozoya was charged with murder in 1986. And the jury found the Defendant not guilty of that charge. Actually, that's a fact. I'm taking judicial notice based on the Court's own records. [¶] You're not to second guess the jury's verdict in that case, and you must presume that the jury properly performed all of its duties. You can consider that evidence in this trial only for the limited purposes of determining whether Mr. Lozoya made certain statements to Joseph Perna and to Joseph Vito Bertoni, and if he did, to give context to those statements. [¶] You're the sole judges of what, if anything, Mr. Lozoya actually said and what he meant by any statements that you find that he made. This evidence may not be considered by you as proof that Mr. Lozoya is a person of bad character or that he had propensity or disposition to commit crimes or acts of violence. [¶] So I give you this instruction so that you have an understanding of the limited purpose for which you can consider that evidence of the prior homicide allegation."

During Bertoni's testimony, the court instructed the jury that they could consider defendant's statement for the truth of the matter stated by defendant as follows: "I just want to clarify the previous instructions I've given you. If after you've heard all of the evidence in the case you conclude as matter of fact that Mr. Lozoya made the statements that's just been testified to by Mr. Bertoni, you can consider the contents of that statement for its truth, both as reported to Mr. Bertoni by Mr. Lozoya, and as reported by Mr. Bertoni to Mr. Perna. If after evaluating all the evidence in the case you conclude that Mr. Lozoya in fact made that statement you can consider it for its true [*sic*]."

" '[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative (see Evid.Code, § 352) if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citations].' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 805 (*Jablonski*).) " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (*People v. Karis* (1988) 46 Cal.3d 612, 638 (*Karis*).) " 'The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair.' " (*Jablonski, supra,* 37 Cal.4th at p. 805.)

Here, there is no question that defendant's statement about the prior murder was admissible at trial as a party admission. (Evid. Code § 1220.) However, defendant challenges the admission of the extrinsic evidence of the prior prosecution to bolster the credibility of Bertoni and Perna and their account of their conversation with defendant.

The evidence of defendant's prior prosecution and acquittal of murder was relevant to Bertoni and Perna's credibility and their account of the conversation they had with defendant. However, we fail to see how the minor relevance of this evidence is outweighed by the significant risk of prejudice that could result from its admission. The evidence of the prior acquittal could "evoke an emotional bias against the defendant as an individual," and lead to an impermissible inference that defendant had the propensity to commit murder, or that he should be punished in this case for the crime of which he was charged and acquitted in the prior case. (*Karis, supra,* 46 Cal.3d at p. 638.)

We are not persuaded by the Attorney General's argument that the prior acquittal evidence was relevant to demonstrate the witnesses' fear of defendant and their

reluctance to contact police following defendant's killing of Garcia. Defendant's admission about the prior case was enough to demonstrate Bertoni and Perna's fear; additional extrinsic evidence about the acquittal was not necessary.

The prior acquittal evidence should not have been admitted in this case, because the risk of prejudice to defendant substantially outweighed the probative value of the evidence to bolster Bertoni and Perna's credibility. (Evid. Code § 352.) However, the fact that the jury was already aware of the prior case as a result of the court; proper admission of defendant's statement, the jury's additional knowledge of the fact of the prior acquittal was not "so prejudicial as to render the defendant's trial fundamentally unfair." (*Jablonski, supra*, 37 Cal.4th at p. 805.) Therefore, the error in admitting the acquittal evidence in this case does not rise to the level of a violation of defendant's constitutional rights.

Because this case presents an error of state law, the proper standard to determine if the error was harmless is that set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Under the *Watson* standard, we find that it is not reasonably probable that defendant would have received a more favorable result had the prior acquittal evidence not been admitted. Evidence of defendant's guilt in this case was overwhelming through both his statements, and Bertoni and Perna's observations. Moreover, the jury was already aware of defendant's prior acquittal through his own statement before any extrinsic evidence of the prior case was admitted. As a result, the error in admitting the evidence did not harm defendant under *Watson*.

Instructional Error

Defendant argues that the court committed instructional error in two ways: by refusing to give an involuntary manslaughter instruction, and in giving two jury instructions related to consciousness of guilt.

Involuntary Manslaughter Instruction

At trial, the defense attorney requested that the court instruct the jury on the lesser included offense of involuntary manslaughter. The court denied the request, stating that the instruction was not appropriate "because this is not a case involving the performance of a lawful act in an unlawful manner, and because it's not an act of criminal negligence."

The trial court has a duty to instruct the jury on principles of law that are closely and openly connected with the evidence and that are necessary to the jury's understanding of the case. (*People v. Birks* (1998) 19 Cal.4th 108, 118.) Instructions on lesser included offenses are required only if the evidence would justify a conviction of the lesser included offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.) "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

The distinguishing feature between murder and manslaughter is that murder includes the element of malice. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) "Malice exists, if at all, only when an unlawful homicide was committed with the 'intention unlawfully to take away the life of a fellow creature' [citation], or with awareness of the danger and a conscious disregard for life [citations]." (*Ibid*., fn. omitted.) Involuntary manslaughter is statutorily defined as including a killing that occurs "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b); *People v. Lewis, supra,* 25 Cal.4th at p. 645.)

Here, an involuntary manslaughter instruction was not required, because the evidence in this case would not justify a conviction of the lesser included offense. There was no evidence that the killing occurred in the commission of a misdemeanor or negligent act.

Moreover, even if it was error not to instruct on involuntary manslaughter in this case, the error would not require reversal of defendant's conviction.

" '[E]rror in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836 [299 P.2d 243]]. A conviction of the charged offense may be reversed in consequence of this form of error only if, "after an examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred (*Watson*, *supra*, 46 Cal.2d 818, 836).' [Citation.]" (*People v. Blakeley* (2000) 23 Cal.4th 82, 93.)

Considering the evidence presented at trial in this case, it is not reasonably probable that defendant would have received a more favorable result had an involuntary manslaughter instruction been given. The jury necessarily found that defendant acted with malice, because it convicted him of second degree murder and rejected his claim of self-defense. In addition, the jury found that defendant personally and intentionally discharged a firearm, necessarily rejecting defendant's claim that the firearm went off by accident. The jury's resolution of the factual disputes in this case regarding defendant's intent, and his intentional use of a firearm preclude a possibility of a conviction of involuntary manslaughter.

CALCRIM Nos. 362 and 371

Defendant asserts that the court erred by instructing the jury with CALCRIM Nos. 362 and 371 on consciousness of guilt. Defendant argues the instructions were argumentative and pro-prosecution.

The trial court instructed the jury with CALCRIM No. 362 as follows: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show

he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The trial court also instructed the jury with CALCRIM No. 371 as follows: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. If the defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. [¶] If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

The California Supreme Court has rejected argumentativeness claims related to CALJIC Nos. 2.03 and 2.06, the predecessors CALCRIM Nos. 362 and 371. (See *People v. Taylor* (2010) 48 Cal.4th 574, 630 (*Taylor*) [rejecting argumentativeness claim as to CALJIC No. 2.03]; *People v. Howard* (2008) 42 Cal.4th 1000, 1021 [affirming constitutionality of CALCRIM No. 362]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [affirming constitutionality of CALJIC 2.03, the predecessor to CALCRIM No. 362]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224 [affirming constitutionality of CALJIC No. 2.03 and CALJIC No. 2.06, predecessors to CALCRIM No. 362 and CALCRIM No. 371, respectively].)

In *People v. Jurado* (2006) 38 Cal.4th 72, 125-126, the California Supreme Court considered argumentativeness claims about CALJIC Nos. 2.03 and 2.06, stating: "We have repeatedly rejected contentions that these standard jury instructions on consciousness of guilt were impermissibly argumentative or permitted the jury to draw

irrational inferences about a defendant's mental state . . . . [Citations.] We see no reason to reconsider these decisions. . . . [T]he instructions . . . correctly stated the law and did not invite the jury to draw irrational inferences about defendant's mental state . . . ." (*Ibid.*)

Defendant acknowledges that the California Supreme Court rejected argumentativeness claims as to the CALJIC predecessors to CALCRIM Nos. 362 and 371 in *Taylor, surpa*, 48 Cal.4th 574, but argues we are not bound by the decision because it lacks analysis. We do not accept defendant's position that *Taylor* lacks analysis, nor that we are not bound by the decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) Moreover, defendant overlooks the other myriad cases in which the California Supreme Court has rejected argumentativeness claims to CALJIC Nos. 2.03 and 2.06.

The CALCRIM instructions on consciousness of guilt that were given in this case (Nos. 362 and 371) were neither argumentative nor pro-prosecution; rather they were neutral and accurate statements of the law.

Prosecutorial Misconduct[2]

Defendant asserts that the prosecutors' prejudicial misconduct in appealing to the passion and sympathy of the jury, and by commenting on defendant's exercise of his right to remain silent, denied him a fair trial.

Under the federal Constitution, a prosecutor commits misconduct when his or her behavior comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) If the prosecutor's conduct does not render a criminal trial fundamentally unfair under the federal standard, that conduct is prosecutorial misconduct

[2] There were two prosecutors involved in this case. Bob Lee, the District Attorney of Santa Cruz County, and Rafael Vazquez, Assistant District Attorney of Santa Cruz County.

under California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

Although a prosecutor is given wide latitude in vigorously arguing the People's case, the prosecutor may not misstate the law. (*People v. Bell* (1989) 49 Cal.3d 502, 538 (*Bell*).) The prosecutor "has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine." (*People v. Thomas* (1992) 2 Cal.4th 489, 526.) "It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial. [Citations.] We recognize that the prosecutor 'may vigorously argue his case and is not limited to "Chesterfieldian politeness" ' [citations], but the bounds of vigorous argument do not permit appeals to sympathy or passion such as that presented here." (*People v. Fields* (1983) 35 Cal.3d 329, 362-363, fn. omitted (*Fields*.)

"[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) We consider the prosecutor's remarks in context of the entire record. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 665-666.) We presume, in the absence of evidence to the contrary, that the jury understands and follows instructions from the trial court. (*People v. Fauber* (1992) 2 Cal.4th 792, 823.) We presume that jurors treat the court's instructions as statements of law, and the arguments of the prosecutor as words spoken by an advocate in an attempt to persuade. (*People v. Thornton* (2007) 41 Cal.4th 391, 441.)

Appeal to the Passion and Sympathy of Jury

Defendant asserts that the prosecutors committed misconduct by appealing to the passion and sympathy of the jury in his opening statement, his questioning of Garcia's niece, and in closing argument.

Mr. Vazquez made a number of comments during his opening statement that appealed to the passion and sympathy of the jury. Defense counsel objected and the trial court sustained all of the objections. Specifically, Mr. Vazquez said that the bullet that killed Garcia "took away his dreams," and that "[t]he evidence will show that it took away his ability to ever know his son." After sustaining the objection, the court admonished Mr. Vazquez to "get to the facts."

Immediately following Mr. Vazquez's questionable comments during his opening statement, defense counsel moved for a mistrial. The trial court denied the motion, stating: "It's not grounds for a mistrial. The jury was instructed prior to the opening statements that they're not to decide the case based upon sympathy, passion or prejudice. The objections were sustained. It was a statement of something that's obvious in connection with the death of a family member or a loved one and what kind of effect it will have on people. It's not a prejudicial statement. It was improper argument during the course of opening statement. That's the reason I sustained the objection. But the instructions previously given are adequate to deal with any potential prejudice that may have resulted from that given that Mr. Vazquez was only stating what is going to be obvious as the effect on any family member of the victim."

During his presentation of evidence, Mr. Lee posed three questions of defendant's niece to which the trial court sustained defense counsel's relevance objections. The first question was: "Did you love your uncle?" Mr. Lee next asked whether Garcia had just found out about the sex of his unborn child before he was killed. Finally, Mr. Lee asked: "You miss your uncle, Isabel?"

Following sustaining defense counsel's objections to Mr. Lee's questions of Garcia's niece, the court instructed the jury as follows: "During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did."

Finally, in closing argument, Mr. Vaquez argued "Juan [Garcia] didn't deserve that. He didn't deserve this presentation neither, neither did his family, neither did Julie Carillo and neither did his son, his young son that he never got the opportunity to see." The trial court sustained defense counsel's objection, and admonished Mr. Vazquez, "Do not appeal to the sympathy."

Later, in closing argument, Mr. Vazquez referred to defendant as a "guy who likes to execute people by lying in wait like a predator killing its prey . . . ." The trial court sustained defense counsel's objection, struck Mr. Vazquez's comments, and told the jury to disregard the comments as improper.

We find that the prosecutors' comments and questions cited above did improperly appeal to the passion and sympathy of the jury.[3] The prosecutors improperly referred to the suffering defendant's family members experienced at the loss of their loved one, which is inappropriate in a trial to determine defendant's guilt. (See *Fields*, 35 Cal.3d at pp. 362-363.) However, based on our review of the entire record in this case, we find there is no reasonable probability that the prosecutors' comments while improper, influenced the jury's guilt determination. There was no dispute that defendant killed Garcia and attempted to hide the body. The only issue at trial was whether defendant had the requisite mental state to support a murder. Evidence of malice to support the second

[3] We are forwarding a copy of this opinion to the California State Bar for review of Mr. Vazquez's and Mr. Lee's conduct in this case.

degree murder conviction was clear through both his statements, and Bertoni and Perna's observations. Based on the record in this case, it is not reasonably probable the jury would have reached a different result had the prosecutors not made the challenged statements.

Moreover, any harm that may have been caused by the prosecutors' statements was cured by the court's admonitions and instructions. The trial court sustained all of the defense objections to the prosecutors' improper statements and questions, striking testimony and admonishing the jury not to consider evidence to which the court sustained objections. In addition, the court instructed the jury with CALCRIM No. 200, stating: "Do not let bias, sympathy, prejudice, or public opinion influence your decision," and if the attorneys' comments conflict with the court's instructions, "you must follow my instructions." We presume the jurors understood and followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Given the admonitions and instructions and the overwhelming evidence, discussed above, supporting defendant's guilt of second degree murder, we conclude there is no reasonable probability that the prosecutors' comments could have influenced the jury's determination of defendant's guilt. (*Medina* (1995) 11 Cal.4th 694, 760.) Any improper conduct on the part of the prosecutors in this case did not result in a miscarriage of justice. (*Bell, supra,* 49 Cal.3d at p. 535.)

Doyle Error

In addition to his argument regarding passion and sympathy, defendant also asserts that Mr. Lee committed *Doyle*[4] error when he improperly referred to defendant's exercise of his right to remain silent during his cross-examination of defendant at trial.

During cross-examination of defendant, Mr. Lee referred to defendant's interrogation by police. The prosecutor asked, "[a]nd so for two years you've been thinking about your testimony, thinking about what happened, and would you agree with

[4] (*Doyle v. Ohio* (1976) 426 U.S. 610, 618.)

me after two years this is the very first time you've told any member of law enforcement, police officer, member of the DA's office this story you told here today?" The court overruled defense counsel's objection to the question, and defendant responded, "[y]es." The trial court denied defense counsel's motion of a mistrial. The trial court admonished the jury regarding Mr. Lee's question as follows: "[b]efore we proceed further, ladies and gentlemen, I want to address something with you that occurred yesterday at the commencement of [defendant's] cross-examination by Mr. Lee. A question was asked—this was the question that was asked. [¶] (Reading): And so for two years you've been thinking about your testimony, thinking about what happened. And would you agree with me after two years this is the very first time you've told any member of law enforcement, a police officer, a member of the DA's office the story you've told here okay? [¶] [Defense counsel] objected to the question. I should have sustained the objection. I did not. That was an error on my part. And you should know that, first of all, the question was improper, the objection should have been sustained. [¶] Under the constitution every accused person has the right to remain silent and the right to the assistance of counsel. So after [defendant] at the conclusion of the interrogation said he didn't want to talk to law enforcement any further, shortly thereafter counsel was appointed to represent him. And in cases of this nature, invariably lawyers instruct their client's not to speak to law enforcement. [¶] And so you cannot construe the fact that he did not speak to law enforcement or the District Attorney about his claim of self-defense until trial against him. Don't discuss that or consider it in any way. [¶] The question should—the question should have been—the objection to the question should have been sustained. And so do not construe the fact that there was no discussion with law enforcement after the interrogation up to the time of trial against [defendant]."

"*Doyle* holds that the prosecution violates due process if it uses the postarrest silence of a suspect who was given *Miranda* warnings to impeach an exculpatory

explanation subsequently offered at trial." (*People v. Evans* (1994) 25 Cal.App.4th 358, 367.)

In *Greer v. Miller* (1987) 483 U.S. 756 (*Greer*), the United States Supreme Court considered whether a prosecutor's question about a defendant's failure to provide his exculpatory story to police upon his arrest violated the defendant's due process rights. The court held that the defendant's rights were not violated, because the trial court sustained defense counsel's objection to the question, provided a curative instruction to the jury, and the prosecution did not use the fact of defendant's silence in his closing argument. (*Id*. at p. 766.)

This case is closely analogous to *Greer*. The prosecutor here elicited testimony from defendant about his failure to tell police before trial that he acted in self-defense when he killed Garcia. This was an impermissible question related to defendant's exercise of his right to remain silent. Although the court erroneously overruled defense counsel's objection and allowed defendant to answer the question, the court remedied its mistake the next day, providing an extensive curative instruction that the jury must not consider defendant's silence in any way in their deliberations. In addition, the prosecutor did not make any reference to defendant's postarrest silence in his closing arguments.

Here, Mr. Lee's single impermissible question and defendant's reply were remedied by the court's curative instruction. This, coupled with the fact that Mr. Lee did not use the fact of defendant's silence in his closing argument, make any error harmless beyond a reasonable doubt. (*Greer*, *supra*, 483 U.S. at p. 766.)

Cumulative Error

Defendant argues that the cumulative effect of his claimed errors deprived him of his constitutional right to a fair trial.

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]" (*In re Avena*

(1996) 12 Cal.4th 694, 772, fn. 32.) " '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

However, as discussed *ante*, since we have found none of defendant's claims of error meritorious and/or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury's verdict in this case. (*People v. Martinez* (2003) 31 Cal.4th 673, 704.)

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

People v. Lozoya
H039145